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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1973

No. 73-358

WILLIAM ALLEN JONES AND WIFE,
BOBBIE JONES

PETITIONERS

VS.

CREDIT BUREAU OF NASHVILLE

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT.

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To the Honorable Warren E. Burger, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Petitioners, William Allen Jones and wife, Bobbie Jones, pray that a Writ of Certiorari issue to review the judgment of the Court of Appeals for the Sixth Circuit entered in the above entitled case on May 30, 1973. (Appendix infra).

OPINION BELOW

The opinion of the Court of Appeals is not yet reported. This opinion is, however, set forth in the Appendix, infra.

JURISDICTION

The judgment of the Court of Appeals was entered on May 30, 1973 (App. infra, P. 14)

The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

Your petitioner respectfully shows:

I.

The question for determination is, whether Petitioners were denied a fair and impartial trial by the District Trial Court, due to prejudicial attitudes, words and actions of the Court communicated to the jury both in open Court and through the news media; and whether the verdict of the jury, wherein it found as a fact that "Yes" Plaintiffs on November 5, 1971 had properly identified themselves, as required by the new Fair Credit Reporting Act (15 U.S.A. Sec. 1681g), had per se required an answer of either that Defendant had negligently failed to disclose to Plaintiffs all information in its files on the Plaintiffs, or wilfully failed to disclose said information; there being no real question of fact as to the failure to disclose since Defendant's own witness admitted that she told them No, you cannot see the file. It is not our policy. (R.122) Therefore, if you ask a jury to answer whether Defendant "negligently" or "wilfully" failed to disclose information, it must by process of elimination decide of which type of failure to disclose Defendant is guilty and whether punitive damages would lie as provided for in 15 U.S.C. 1681N Civil Liability for Wilfull Non-Compliance, rather than merely compensatory damages if it were negligent non-compliance.

Even pending trial of this case Petitioner William Allen Jones in good faith went back to the Credit Bureau to see about a financing matter that the lender needed a credit report on Petitioner William Allen Jones, and though polite to him, the Defendants' representative said the file wasn't there and on their Attorney's advice until case was decided, they couldn't do anything involving their file and Petitioners believed that money lost on this transaction should have been part of damages flowing from Defendants' violation of the Act. (R.p.28)

The United States District Court For the Middle District of Tennessee, upon receiving the answers to the questions proposed to the jury, entered a judgment for the defendant. (R.177)

The United States Court of Appeals For the Sixth Circuit held that "the judgment of the District Court on the verdict and the order of the District Court denying Appellants' motion for a new trial be, and it is hereby, affirmed." (Appendix, infra.)

The decision of both the District Court and the Court of Appeals is in conflict with the clear and cogent intent and purpose of The Fair Credit Reporting Act, 15 U.S.C. 1681 et seq. and this being to the best of Petitioners' knowledge the first case involving this new act to be appealed, they believe that construction and interpretation of this Act is greatly needed to provide Consumers and Credit Reporting Agencies with necessary guidelines for the implementation of said Act. They also firmly believe that both the District Court and the Court of Appeals were in error in their interpretation and construction of the Act and the jury verdict's relation thereto.

II.

SUMMARY STATEMENT OF THE MATTERS INVOLVED:

This suit was commenced in the United States District Court For the Middle District of Tennessee, Nashville Division by Petitioners, who claimed that Defendant's refusal to let them see their file violated their rights under the Fair Credit Reporting Act, as set forth in 15 U.S.C. Sections 1681-1681 (t), to see their credit files and have corrected any erroneous information therein, and to obtain compensatory and/or punitive damages resulting therefrom.

Defendant answered, and denied any violation of the Fair Credit Reporting Act and alleged that Petitioners never properly identified themselves and therefore Defendant could not disclose information in their file and Defendant further alleged that Petitioners had not suffered any damages whatsoever as a result of any action or inaction on the part of the Defendant and denied that it owed Petitioners any money compensatory or punitive, or costs or attorney's fees.

The case was heard by a jury of six members. At the end of all proof at about 4:00 P.M. a motion for directed verdict in favor of Defendant, Credit Bureau of Nashville, was made after the jury had been excused. After some discussion by the Court, Counsel for Plaintiffs, William Allen Jones and wife, Bobbie Jones, and Counsel for the Defendant, Credit Bureau of Nashville, the Court took a recess to determine whether to let the case go to the jury or to grant the motion for a directed verdict. (R. 151 & 152)

After the recess the Court advised that he was going to let the case go to the jury solely on the incident involved at the time of the demand to see the Credit Report on November 5, 1971 and the damages directly flowing from that failure to permit Plaintiffs the inspection of the records on November 5, 1971. It was to be purely and simply the technical violation of 15 U.S.C. Sec. 1681 (n) and 1681 (o), and the Court said that if the jury determines that the Defendant, Credit Bureau of Nashville, has violated the Act, the jury will be permitted to fix the compensatory damages and the Court will reserve the right to fix, in accordance with the language of the statute, Attorney's fees and Court costs and punitive damages. (R. p. 152)

The Court instructed the jurors as follows, and adjourned for May 30, 1972 at 4:59 P.M.:

"You can go home and come back in the morning at 9:00 o'clock. We will terminate this case in the morning. Do not discuss this case among yourselves; do not discuss it with anyone. That includes husbands, wives, brothers and sisters. They are people too, and when you come back in the morning, don't discuss it with anybody. The first discussion you will have is when you get out in the jury room after argument of counsel and the charge is given you by the Court." (R. p. 153)

The Court convened at 9:05 A.M. May 31, 1972, and advised the jury that, "it is your responsibility to determine, first, whether the Plaintiffs properly identified themselves, that is

your first issue. The second is, whether or not the Defendant, after they (Plaintiffs) had properly identified themselves, if they did, negligently failed to disclose all the information. Number three, if the Plaintiffs properly identified themselves did the Defendant wilfully fail to disclose the information?" (R. pp. 156, 157)

Closing argument by Mr. Meacham on behalf of the Plaintiffs, closing argument by Mr. Stewart on behalf of the Defendant and closing argument in rebuttal by Mrs. Bobbie Jones on behalf of Plaintiffs was heard.

The Court then charged the jury as to the law applicable to this case both evidentiary and statutory.

The jury retired to deliberate on the verdict at 10:06 A.M. May 31, 1972 and returned their verdict at 11:33 A.M. May 31, 1972 as shown on the verdict form:

No. 1–Did the Plaintiffs properly identify themselves to the Defendant at the time they demanded information?
Answer, YES.

No. 2–Did the Defendant negligently fail to disclose to Plaintiffs all information in its files on the Plaintiffs?
Answer, NO.

No. 3–Did the Defendant wilfully fail to disclose to Plaintiffs all information in its files?
Answer, NO. (R. p. 176)

The Court stated "all right, a verdict for the Defendant will be entered and you may be excused and you may leave at this time and you will be notified when to return." (R. p. 176 & 177)

Petitioners within time allowed filed a Motion for New Trial wherein they stated grounds that:

1. **The verdict is contrary to the Law;**

2. **The verdict is contrary to the evidence;**

3. **That prejudicial remarks of the Court, when the Jury was excused to allow discussion of Defendant's Motion for a Directed Verdict at end of all proof, were published in the Nashville Tennessean the morning of May 31, 1972 and the newspaper which has a wide public distribution, was available to and was seen by the jurors in this case prior to the final deliberations and rendering of their verdict;**

4. That the phrasing of the questions answered by the jury was confusing to the jury;

5. That the Court erred in declaring the answers to them by the Court to be a verdict in favor of Defendant due to inconsistency of question No. 1 being answered "YES" and both of the other questions being answered "NO";

6. That petitioners were denied a fair and impartial trial by actions and attitude of the Court in conducting the trial as shown by his statements, among others, "that I think the whole lawsuit is ridiculous." and which remarks were communicated to the jurors by the news media.

On June 15, 1972 said Motion for a New Trial was denied without oral argument, the Court stating that it is "of the opinion that oral argument would not be helpful. There is no rule of this Court requiring such a hearing." (Appendix, infra)

Petitioners feel that this is indicative of the Court's prejudicial attitude toward their case which pervaded and permeated the entire trial and denied them a fair and impartial trial.

In time allowed Petitioners appealed the judgment of the District Court to the United States Court of Appeals for the Sixth Circuit and on May 30, 1973 said Court of Appeals held that "the judgment of the District Court on the verdict and the Order of the District Court denying Appellants' Motion for a New Trial be, and it is hereby, "affirmed." Said Court of Appeals stated in said Order that "the Court is of the opinion that, although we strongly disapprove of the comments made by the Court, we do not find them to have been prejudicial to Appellants." (Appendix infra)

The principal questions involved on said appeal may be summarized as follow:

1. Did the District Court misconstrue the Fair Credit Reporting Act when it rendered its judgment interpreting the answers to the questions submitted to the jury to be a verdict for the Defendant?

2. Were the petitioners denied a fair and impartial trial by prejudicial words, actions and attitudes of the Court, which were communicated to the jury in open Court by his taking over almost completely the questioning of petitioners' witnesses thereby effectively disorganizing or destroying petitioners' attorneys' efforts to conduct and present a proper case to the jury?

3. Were the petitioners denied a fair and impartial trial by remarks of the Court out of presence of the jury being available to and communicated to jurors by the news media prior to rendering their verdict?

These questions were decided by the United States Court of Appeals for the Sixth Circuit in favor of the defendant and not in accord with the clear meaning of the Fair Credit Reporting Act, 15 U.S.A. 1681 (t). Their decision also is not in accord with applicable decisions relative to the District Court's words and actions in conducting the trial.

Briggs vs. The United States (C. A-6 Tenn.) 22IF2d 636

Meyer vs. Cadwalader 49F32

Marshall vs. The United States, 360 U.S. at 312-313, 79 S. Ct. at 1173, 3L. ED. 2d at 1252

U. S. vs. McKinney (5 C.A.) (1970) 429 F2d 1019 at page 1224

Quercia vs. United States, 289 U.S. 466 at page 470, 63 S. Ct.697 at page 699, 77 L. ED. 1321

III.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

1st. In Conflict with the clear intent, purpose and meaning of the Fair Credit Reporting Act 15 U.S.C. 1681-1681 (t).

The decision of the District Court, as affirmed by the Court of Appeals for the Sixth Circuit, misinterprets and misconstrues The Fair Credit Reporting Act, which at 15 U.S.C. 1681 (g) says mandatorily that "Every consumer reporting agency shall, upon request and proper identification of any consumer, clearly and accurately disclose to the consumer:

(1.) The nature and substance of all information (except medical information) in its files on the consumer at the time of the request, and said Act at 15 U.S.C. 1681a subsection (g) states: "The term 'file', when used in connection with information on any consumer, means all of the information on that consumer recorded and retained by a consumer reporting agency regardless of how the information is stored."

When the jury held that "Yes", petitioners did properly identify themselves to that Defendant at the time they demanded information, the mandatory words of the statute, (shall . . . disclose) required that all information in Defendant's files at the time of the request "shall" be disclosed to petitioners.

Blankenship vs. State, 443 SW. 2d 442, 223 Tenn, 158 et seq. at page 165 stated, "In other words, penal statutes, which use the word "shall" and then provide a penalty for failure to do what is required, are universally classified as mandatory statutes."

Also the word "shall" as used in constitutions or statutes is ordinarily construed as being mandatory and not discretionary or directory.

U.S. vs. Machado, D.C. Cal. 306 F. Supp. 995, 997

Stubbs vs. State, 393 SW 2d 150, 216 Tenn. 567

Louisville and N.R.Co. vs. Hammer, 236 SW 2d 971, 191 Tenn. 700.

Petitioners firmly believe that to allow this verdict to stand as a precedent under the new Fair Credit Reporting Act would be to, in effect, totally emasculate the Act and allow the Credit Reporting Agencies to point to it and say in effect that they still could not be regulated nor required to disclose information in a consumer's file and to get it corrected or cleared up and be able to obtain things that credit would permit.

Petitioners believe that in its ruling on the jury verdict, the District Court, which was affirmed by the Court of Appeals for the Sixth Circuit, did not take this Fair Credit Reporting Act seriously enough and made an erroneous, snap judgment. This important construction and interpretation of a new Federal law, The Fair Credit Reporting Act, has not been, but should be settled by this Supreme Court of the United States.

Petitioners believe that the only proper interpretation of the verdict of the jury, hereinbefore set forth, was that "Yes", there was proper identification and therefore it was mandatory that the Credit Bureau of Nashville disclose all information in its file at that time and since there was admittedly no disclosure of information, the Credit Bureau was guilty of a wilful failure to disclose to Petitioners rather than a negligent failure to disclose and punitive damages should be assessed.

2nd. Congress undoubtedly placed jurisdiction of the violations of the Fair Credit Reporting Act in Federal Courts rather than in local state courts because the U. S. District Court and members of its juries, who are usually from a greater area, are less subject to the influence of the local Credit Bureaus and credit reporting agencies, that have power over each individual's future through control of his accessibility to credit for the vital essentials, such as food, clothing, home, car, medical care, etc.

The District Court's prejudicial words, actions, and attitudes clearly indicated that he was impatient with the Act that put jurisdiction in his Court and that he didn't think this type action was substantial enough for him to spend his time on. Petitioners believe that he thus lost sight of the prime purpose and intent of the Act and has so far departed from the accepted and usual course of judicial proceedings that Petitioners were deprived of a fair and impartial trial and that the Court of Appeals for the Sixth Circuit in its affirming said lower court's ruling so far sanctioned such a departure by a lower court, as to call for an exercise of this Supreme Court's power of supervision.

The District Court's remarks, referred to above, with the jury in Court and those (out of jury's presence) published in the news media indicated very strongly and clearly the prejudicial attitude of the Court toward Plaintiff's case and coupled with the fact that the jury had every opportunity to see this article and some, in fact, stated they had seen the article. In this connection the following statement in *Briggs vs. The United States* (Ca6Tenn) 221 F2d 636 and *Meyer vs. Cadwalader* 49F32 is much in point:

"It is idle to say that there is no direct evidence to show the jury read these articles. They appeared in the daily issues of leading journals, and scattered broadcast over the community. The jury separated at the close of each session of the Court, and it is incredible that going out into the community, they did not

see and read these newspaper publications. That these published statements were well calculated to prejudice the jury is a proposition so plain that it would be a sheer waste of time to discuss it."

As said by Chief Justice Hughes in *Quercia vs. United States,* 289 U.S. 466, at page 470, 63 S. Ct. 698 at page 699, 77 L.ED 1321:

"The influence of the trial judge on the jury 'is necessarily and properly of great weight' and 'his highest word of intimation is received with deference and may prove controlling.' This Court has accordingly emphasized the duty of the trial judge to use great care that an expression of opinion upon the evidence 'should be so given as not to mislead, and especially that it should not be one-sided'; that 'deductions and theories not warranted by the evidence should be studiously avoided'."

Also in granting a new trial in *Briggs vs. The United States* (supra) and in *Stone vs. The United States* (6 Cir) 113 F2d70, 77 the Court said that "the question is not whether any actual wrong resulted under the circumstances related, but whether it created a condition from which prejudice might arise or from which the general public would suspect that the jury might be influenced to reach a verdict on the ground of bias or prejudice."

In *U.S. vs. McKinney* 5th C.A. (1970) 429-F2d1019 at page 1224, the Court said:

"The Marshall decision has served to accentuate the duty of the federal courts to guard against the effect of prejudicial newspaper publicity, as the Third Circuit has said, 'whatever may have been the law prior to "Marshall", since that decision it has been clear that a new trial should be granted in federal criminal cases when it is shown that members of the jury have read news accounts which include inadmissible facts prejudicial to the Defendant."

United States vs. Kun Seng Seo 3rd Cir. C.A. (1962) 300 F2d 623, 625, see also *Holmes vs. U. S.* 4th Cir. C.A. (1960) 284 F2d 716, 718 and at page 1025.

"Moreover, as the Supreme Court observed in "Marshall", the prejudice to the Defendant is almost certain to be as great when (prejudicial) evidence reaches the jury through news accounts as when it is part of the prosection's evidence . . . It may indeed be greater for it is not them tempered by protective procedures." *Marshall vs. The United States* 360 U.S. at 312-313, 79 S. Ct. at 1173, 3 L.ED 2d at 1252.

CONCLUSION

Petitioners believe that the only reasoned interpretation of the uncontroverted facts included in the questions to the jury and the jury's verdict and the verdict's application to the Fair Credit Reporting Act allows only the conclusion that Credit Bureau of Nashville was guilty per se of a violation of the Act and that the Court erred in rendering a judgment for the Defendants on said verdict. This case being to the best of Petitioners' knowledge the first case to come before this Supreme Court, they believe that it is an appropriate vehicle for this Court to set out authoritatively once and for all, the construction and interpretation of the provisions of the Fair Credit Reporting Act and to furnish thereby guidelines for both Credit Reporting Agencies and the consumers in complying with this Act and carrying out the intent and purposes for which it was enacted.

Petitioners respectfully pray that their Petition for Writ of Certiorari be granted and that the Judgment of the Court of Appeals for the Sixth Circuit affirming the judgment of the District Court may be reversed by this Honorable Court and judgment entered in their behalf and a remand to the District Court for a hearing as to damages or that a new trial be granted; and that Petitioners may have such other and further relief in the premises as this Honorable Court may deem meet and just.

Respectfully submitted,

William Allen Jones
Bobbie Jones
By: C. Alex Meacham
Counsel for Petitioners

APPENDIX A.

In the United States District Court For the Middle District of Tennessee Nashville Division

WILLIAM ALLEN JONES and wife, BOBBIE JONES	)	
vs.	)	CIVIL ACTION NO. 6437
CREDIT BUREAU OF NASHVILLE	)	

ORDER

The Motion For New Trial is hereby denied without oral argument. The court is of the opinion that oral argument would not be helpful. There is no rule of this court requiring such a hearing.

L. Clure Morton
United States District Judge

ATTEST: A TRUE COPY
Brandon Lewis, Clerk
U. S. District Court
Middle District of Tennessee
By: _____ D.C.

APPENDIX B

No. 72-1923

United States Court of Appeals
For The Sixth Circuit

WILLIAM ALLEN JONES AND WIFE, BOBBIE JONES	)	
Appellants,	)	
v.	)	ORDER
CREDIT BUREAU OF NASHVILLE,	)	
Appellee.	)	

Before: EDWARDS and CELEBREZZE, and O'SULLIVAN, Senior Circuit Judge.

This is an appeal from a judgment of the District Court on a jury verdict for Appellee and from an order of the District Court denying Appellants' motion for a new trial. Having reviewed the briefs and the record and upon hearing oral arguments, the Court is of the opinion that, although we strongly disapprove of the comments made by the Court, we do not find them to have been prejudicial to Appellants. Further, we find no prejudicial error in the trial.

Accordingly, it is ORDERED that the judgment of the District Court on the verdict and the order of the District Court denying Appellants' motion for a new trial be, and it is hereby, affirmed.

ENTERED BY ORDER OF THE COURT

James A. Higgins Clerk